88-1064

Supreme Court, U.S.
FILED
NOV 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NUMBER _____

UNITED STATES SUPREME COURT

Term October, 1988

Clayton Kendall Miller III
Plaintiff-Appellant

Ninth Circuit
Court of Appeals
#86-2452

vs.

FDC TUC RMB
#83418

ConAgra and Peavey Corporation
Defendant - Appellees

Nature of Proceeding

Originally to determine the value of a stockholders shares in a public corp - oration that was sold at less than book value.

TITLE

Petition to the U.S. Supreme Court to review Ninth Circuit Court of Appealls final decision .

QUESTIONS PRESENTED

1. In a Mandantory Binding Arbitration Proceeding is the decision of a panel of Appraisers acting in a fiduciary capacity - - final - - absolutely - - and considered to be rendered in good faith when said decision ignores that which clearly exists and is in complete contradiction to the panel's decision?

May I clarify this? Some detail is necessary to understand this. In this matter the Corporation filed with the Securities and Exchange Commission accounting data signed by a CPA that clearly suggests value in terms of "Net Cash Flow" and Asset Value considerably overbook value. Replacement value of the Corporation's assets was several $100 million more than "Book Value".

The Corporation and the Appraisers "insisted all that mattered was Goldman

Saks opinion". "Since Miller was "one person" and appraisal's are expensive there would be no appraisal". It was suggested that I had to make them follow the law. Federal law recognize's that a Corporation's ability to earn a profit and accumulate assets determine the value of a stockholder's shares. In an appraisal proceeding such as this when these factors exist they cannot be ignored.

2. Question - Did the Federal District Court - Tucson and the Ninth Circuit Court of Appealls error and overlook Smith verses VanGorkom in reaching their decision?

3. How can a state law allow an opinion to be rendered that is in conflict with federal law and generally accepted procedures and yet be considered to be rendered in good faith. This Appraisal proceeding took almost 2 years to do?

4. Question - therefore how can this pro-

ceeding be considered to be in good faith? My understanding is that the Appraiser's opinion is binding when "good faith" is not a question. The wording of 301-40 suggests that "good faith" cannot be present - simply because the accounting data suggests value over the $30 per share my shares are supposed to be worth. Therefore, the Federal District Court in Tucson and the Ninth District Court in California should have remanded the "Appraiser's Report" back to the arbitration panel - because same ignored federal law and generally accepted methods of valuing a dissenters shares, therefore it was not rendered in good faith.

5. Is Minnesota law 301-40 unconstitutional in part? The law suggests a fiducary responsibility on the part of the arbitrator's. Yet, the Minnesota laws seem to allow them to ignore generally accepted methods as to how a shareholders shares are valued.

It allows the Appraisers to ignore

whatever factors are in conflict with the Appraiser's desired end result. The lawyer's tell me I am in a gray area of law. The point being that these Minnesota laws deprive me of the protection of federal law - that is the end result. Because the Appraisers could ignore whatever they wanted to the law gives them permission to do so. Also these laws are too general and far reaching and place the Appraisers in a position that is above federal law.

6. Question - do I need judical review to determine if this opinion violated the doctrine of good faith?

7. Could the Court clarify what consitutes "lack of good faith" in a mandantory binding arbitration proceedure such as this?

The Parties to this Proceeding are as follows:

Clayton Kendall Miller III — No. 86-2452

an unmarried man — FDC TUC-RMB #83418

Plaintiff - Appellant

vs.

ConAgra Corporation (a Delaware Corporation) and Peavy Corporation doing business in the state of Arizona

Defendant-Appellee

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WHY THE COURT SHOULD HEAR THIS CASE

The Court should hear this matter to clarify and preserve a stockholder's rights. Because so many buyouts happen at a price that has no relatiosnhip to actual value a stockholder that requests an appraisal proceeding will be short changed by the Corporation. Because an appraisal at more than the sales price creates a problem the Corporation simply refuses to appraise thereby destroying the concept of private property. And in this case making a mockery of the concept of binding arbitration by ignoring the umbrella of fiducary responsibility that surrounds binding arbitration.

There are many stockholders caught up in law suits as a result of leveraged buyout that took place at a "number" that has little relationship to a Corporation's real value. The wisdom of the Court in this matter would preserve the concept of the law being for everyone - - rich/man or poor/man.

GROUNDS ON WHICH THE COURT HAS JURISDICTION

On April 29, 1988 the U.S. Court of Appeals issued a memorandum dismissing the case.

Miller requested a rehearing May 9th, 1988.

On August 25, 1988 the Ninth Circuit Court denied a petition for a rehearing.

Miller request the U.S. Supreme Court review this matter.

Miller apologizes for coming before the Court without legal representation or benefit of legal advice. I do not know which statutory provision confers on this Court jurisdiction to review the decree in question by Writ of Certiorari.

The basis for federal jurisdiction in the Court of first instance is based on diversity pursuant to 1332 (A) of the U.S.

Judical Code (28 U.S.C. 1332 (A)). Venue lies in F.D.C. pursuant to 1391 (A) of the U.S. Judicial Code (28 U.S.C. 1391 (A)). I hope this is correct!

STATEMENT OF THE FACTS

Miller the Appellant in this matter owned 1100 shares of Peavey Company, a Minnesota Public Corporation, who's shares were traded on the New York Stock Exchange. Peavey Corporation was a big exporter of wheat.

Fiscal "81" was a record year in terms of sales and profits. The Corporation was strong financially with a long strong record of profitability.

The Carter Wheat Embargo took effect and caused Peavey's stock to drop in price.

ConAgra and the International Bankers put together a leverage buyout at $30 per share. The Appraiser's Report, page 29, suggests that the sales price was determined by finding a "number" close to book value - - and a "number" that would give ConAgra the proper

return on it's investment. Other factors which give a Corporation value were ignored! Since $30 was less than book value, Miller dissented under Minnesota laws 301-40 and 301-44, and requested an appraisal proceeding to determine the fair cash value of his shares. The $30 figure ignored Peaveys 10 year record of sales and profitability $86,000,000 in accumulated depreciation and the fair market value of Peavey's assets.

Right from the beginning, Peavey Corporation said they would not appraise my shares-- "it would cost too much" $30 was fair, Goldman Sak's said so, "the accounting data meant nothing", Peavey was not going to pay for an appraisal. Miller had to make them. Peavey insisted that the Corporation was on the brink of financial disaster and since I was one person I could go to Hell. Miller pointed to the accounting data which strongly suggests value over and above the $30 offer. Peavey said "they were not going to pay to prove anything"?

Peavey refused to make an offer saying, "they were not going to bid against themselves"!

This situation became a matter of principal and as a result, this law suit was filed in June of "83".

As soon as the Appraisers were in place they contacted my attorney and said I had to make a reasonable demand for payment - - there would be no appraisal proceeding. "Who did I think I was challenging - - the International Bankers?" The Corporation and the Appraisers refused to supply Miller with needed information to determine his share value (appraisals on Peavey's assets) and insisted $30 was it! My attorney pointed to the accounting data - - the Appraisers said it meant nothing and further stated they were not going to prove anything. Goldman Saks said $30 and that was good enough for them. Next came almost 2 years of constant pressure from the Corporation and the Appraisers to force Miller to pay for the proceeding.

while insisting that since Miller thought his shares were worth more, he would have to prove it - - the Appraisers would not all the while insisting Miller and his attorney was a "nut" looking for a handout!

Finally the Appraisers filed their report. The conclusion being $30 was fair cash value. What else could the Appraiser do? If they did what they were supposed to there would be a prodigious perponderance of accrued appraised value so as to make the entire transaction highly suspect.

In view of Smith verses VanGorkom, decided by the Delaware Supreme Court on January 29, 1985, the Court determined that an appraisal of a shareholder stock that was less than book value and ignored such factors as accumlated depreciation was questionable. The Court further stated that when an appraisal proceeding found value over and above the per share sales price, said value belonged to whoever had a claim to it. ConAgra is a

Delaware Corporation. Does this case apply to the matter at hand?

In the matter at hand the accounting data suggests several hundred million in value, see addendum SEC filings, page 25 & 26.

Miller suggested to the Federal District Court, Tucson, - that this proceeding was not in good faith - - the Court said no. Miller went on to the Ninth Circuit Court, San Francisco, - - the Court said no!

Again the lawyers tell me I am in a gray area. Overturning binding arbitration by claiming the accounting data suggests lack of good faith is difficult. The court system is loaded with stockholder suits; most of which are the result of mergers that took place at prices that ignore most of the factors that give a Corporation value. Perhaps the U.S. Supreme Court will hear this case and clear the way for other little

guys caught up in Wall Street's back room shenanigans. To do so would solidify a stockholder appraisal's rights while stabilize our financial markets.

Since this action began in June of 1983, Peavey Corporation and the Appraisals never once denied the accuracy of the accounting data - - instead their cry was "so what" - "what can he do about it?". Binding arbitration is binding period! I think not - - for if so, the purpose of binding arbitration will be seriously weakened.

Miller requests that on behalf of the small stockholders who get caught up in questionable leveraged buyouts such as this that the U.S. Supreme Court hear this plea for justice.

Clayton Kendall Miller III
PRO PERSONA
4565 N Palacio
TUC AZ 85715
602-749-5269

88-1064

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ADDENDUM

Clayton Kendall Miller III — Ninth Circuit Court of Appeals #86-2452 FDC TUC RMB #83418

Plaintiff-Appellant

vs.

ConAgra and Peavey Corporation

Defendant - Appellees

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Originally to determine the value of a stockholders shares in a public corporation that was sold at less than book value.

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ADDENDUM

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ADDENDUM

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Clayton K. Miller, III	)	
	)	
Plaintiff-Appellant,	)	No. 86-2452
	)	
v.	)	D.C. No. 83-418-T-RMB
	)	
PEAVEY COMPANY; CONAGRA, INC. corporations doing business in the state of Arizona,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: FERGUSON, LEAVY, circuit Judges, and REDDEN,***

The panel has voted to deny the petition for rehearing. Judges Ferguson and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Redden has so recommended.

*** Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAYTON KENDALL MILLER III)	No. 86-2452
PLAINTIFF-APPELLANT)	DC# CIV-83-481RMB
)	Appellant's suggestion for a rehearing EN BAC
vs.)	
PEAVEY COMPANY, et al.,)	
Defendants-Appellees)	

PETITION TO THE 9TH CIRCUIT COURT OF APPEAL

TO THE CLERK OF THE COURT

Introduction

In appellant's judgement one or more of the situations in the purpose section exist. Concerning the court's 4/29/88 judgment a copy is enclosed, a rehearing is requested.

The court should rehear this case because the Minnesota law discussed on page 6 of the Courts Judgment is a CATCH 22 SITUATION, and

seems to deprive me of federal judicial review one way or another. Suppose appellant sought judicial review under 28 U.S.C. section 2202 - - -Peavey's lawyer would argue for 2 years that the Minnesota law on page 6 says - - - in part "is the final judge of both law and fact" and his award will not be reviewed or set aside for mistake of either law & fact" - - -" an award will not be set aside merely because the court thinks the arbitrators erred either as to the law or the facts". In this case the appraisers possibly erred by several $100M. Accounting data and common sense suggests this.

This law allows the appraisers to blatenly ignore that which clearly exists, in terms of value, in an appraisal proceeding and allows them to ignore federal case law which suggests that the appraiser cannot ignore these factors.

The Minnesota law on page 6 allows the appraisers to do as they please and ignore federal case law. Because the law suggests "no review" what can a weak party to a binding arbitration procedure such as this do about it? Minnesota law does this indirectly by not allowing a check and balance. This is important in this situation because it allows the appraiser to co er up and ignore whatever they want to. The law is too far reaching!

Request that the COURT review the facts mentioned in the appellant's filing's in the 9th Circuit Court. Letter dated 11/24/86, pleadings dated 9/26/87, 1/12/88. Appellant especially request a review of his affidavit filed 1/12/88 which suggests misconduct by the appraisers.

Also, items from the Tucson Federal Court Docket sheet #'s 28-24-75-76 and 83. These

are material points of fact that may have been overlooked in the decision. The item's above clearly suggest that the appraisals award is pattenly unfair and therefore should be set aside.

Peavey Corporation never disputed anything Appellant said in his filings with the 9th Circuit Court. Their attitude is "so what". Binding arbitration is binding!

The Minnesota law is too far reaching and as such allows the appraiser to ignore whatever clearly exist's and is contrary to their desired end result. Minnesota laws allows for error and omissions. But to blatantly ignore common sense is too much - - - - (Peavey was sold at less than book value and fiscal `81' was a record year in sales - profits).

Not to mention ignoring federal case laws which deprives me of the protection of same. If the appraiser ignored same it could be said that this law indirectly takes away my rights under federal law.

To preserve the sanctity that surrounds binding arbitrations appellant suggests that a rehearing EN BAC is in order. This matter is of national importance - - - note the huge number of stockholder suits in the court system.

Dated this 9th day of May, 1988

A copy of the
foregoing mailed
this day May 9, 1988
to Frank Placenti,
Phoenix, Arizona
Attorney for the
Appellee

CLAYTON KENDALL MILLER III
PRO PER
4565 N. Palaside
Tucson, Arizona 85715
(602 749-5269

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAYTON K. MILLER, III	)	
	)	
Plaintiff-Appellant,	)	No. 86-2452
	)	
v.	)	D.C. No. 83-418-T-RMB
	)	
PEAVEY COMPANY; CONAGRA, INC. corporations doing business in the state of Arizona,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding

Submitted** April 12, 1988
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a)

Before: FERGUSON, LEAVY, Circuit Judges, and REDDEN,[***]

FACTS AND PROCEEDINGS

In June of 1982, Clayton Kendall Miller III (Miller), an Arizona citizen, owned 1,100 shares of stock in Peavey Company (Peavey). Peavey is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. In May 1982, the Board of Directors of Peavey gave notice to its shareholders of a special meeting to be held on June 24, 1982. The purpose of the meeting was to consider a merger with a wholly owned subsidiary of ConAgra, Inc. (ConAgra).

At the June 24, 1982 meeting, Peavey's shareholders were offered a cash price of $30.00 per share or ConAgra stock worth $30.00 per share in exchange for consenting

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[***] Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

to the merger and tendering their Peavey stock. At that time, Peavey's stock was worth $26.00 per share on the New York Stock Exchange. Before the public announcement of the proposed merger, the stock was selling for approximately $17.00 per share.

Of the 2,552 Peavey shareholders, only Miller dissented from the merger. The merger took place on July 20, 1982.

If a shareholder dissents to a merger, 1951 Minn. Laws section 301.44(1) (repealed 1984)[1] provided that a written objection could be filed and a demand made for payment for all shares. Section 301.44(1)[2] also

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[1] Section 301.44(1) has been superceded by the Minnesota Business Corporation Act of 1984, which does not apply retroactively.

[2] Section 301.44(1) stated in relevant part:

> If a domestic corporation has given notice to shareholders of a proposal to merge into or consolidate with any other corporation or corporations, a shareholder may, at any time prior to the date of the meeting at which such proposed merger or consolidation is

provided that if a corporation and a shareholder could not agree on a fair cash value for the shares, the value is to be determined in accordance with 1951 Minn, Laws section 301.40. Section 301.40(2) (amended 1965) (repealed 1984) provided for the appointment of three disinterested appraisers to determine the fair cash value at the time of the merger.[3]

> to be voted upon, file a written objection to such merger or consolidation in the office of the secretary or president of the corporation and demand payment for his shares and have the fair cash value thereof determined as provided in section 301.40.

[3] Section 301.40(2) stated in relevant part:

> If, after such a demand [for payment for shares] by one or more shareholders, the corporation and one or more shareholders cannot agree upon the fair cash value of the shares at the time [of the merger] such value shall be determined in a single proceeding by three disinterested appraisers, one of whom shall be named by the shareholders, another by the corporation, and the third by the two thus chosen.

After it received Miller's objections, Peavey tried to negotiate a fair price for Miler's shares, but Miller refused to negotiate or to set a price. H claimed it wa impossible to set a price because he did not know the true value of Peavey's assets. Then the parties disagreed about how to conduct the arbitration proceeding. Subsequently, Miller filed a complaints in the District of Arizona asking for a declaratory judgment pursuant to 28 U.S.C S 2201 and Federal Rule of Civil Procedure 57 on what procedures were proper. The district court had diversity jurisdiction pursuant to 28 U.S.C. S 1332.

In his amended complaint, Miller requested the court to decide whether section 301.40(2): (1) allowed discovery prior to the arbitration proceeding, (2) required the corporation to pay for appraiser's expenses and other expenses, and (3) allowed the right to subpoena documents, to compel witnesses'

attendance, to have witnesses testify under oath, and to cross examine witnesses, as well as other procedural rights. Both parties moved for summary judgment on the ground that there were no genuine issues of material fact as to the procedures required by section 301.40(2) to determine the fair cash value of a dissenter's shares in an arbitration proceeding.

On February 27, 1984, the district court entered its judgment declaring the procedures to be used and the rights of the parties pursuant to section 301.40(2). Miller did to appeal that judgment.

The arbitration panel delivered its confidential final report, Valuation as of 7/20/82 of Peavey Company by Court Appointed Arbitration Panel (March 31, 1986) (The Arbitrator's Report), to the district court on April 22, 1986. At a status conference before the district court on June 23, 1986,

Miller objected to the panel's valuation of his stock. The pa el had concluded unanimously that the fair cash value of Miller's shares at the time of the merger was $30.00 per share, the price Miller had been offered. Miller claimed the appraisal was not fair because it did not determine Peavey's net asset value. He asked the district court to remand the report to the panel and order it to use a different appraisal method.

On July 17, 1986, the district court concluded that the arbitration panel had complied with section 301.40(2) and its judgment of February 27, 1984, and ordered the matter dismissed. It did not examine the merits of the panel's determination of fair cash value. Miller appeals pro se from that order. We affirm.

DISCUSSION

After a court issues a declaratory judgment under 28 U.S.C. section 2201, 28 U.S.C. section 2202 provides that a district court may grant "{f}urther necessary or proper relief based on a declaratory judgment . . . after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

The district court properly dismissed Miller's challenge of the panel's determination. It did not have jurisdiction to examine the merits of that determination. Section 301.40(2) provides that "{t}he determination of a majority of the appraisers in good faith made shall be binding on all demanding shareholders and the corporation{.}" (Emphasis added). Miller presents no evidence that the appraisers acted in bad faith when they determined the value of his stock.

The district court found that the appraisal proceeding which section 301.40(2) contemplated is a non-judicial compulsory arbitration proceeding, to be conducted in accordance with the procedures set forth in the Minnesota Uniform Arbitration Act, Minn. Stat. An. SS 572.08-30 (West 1988), which was adopted in 1957.[4] Minnesota cases which interpret the Uniform Arbitration Act hold that when an issue is raised regarding the merits of an arbitrator's decision:

> (A)n arbitrator, in the absence of any agreement limiting his authority, is the final judge of both law and fact, . . . and his award will not be reviewed or set aside for mistake of either law or fact in the absence of

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[4] The court was provided with an expert witness's analysis of the legislative history of section 301.40(2) and Minnesota case law to determine if that section contemplates an arbitration proceeding subject to the Uniform Arbitration Act. The expert witness, Professor Richard Ihrig of the William Mitchell College of Law in St. Paul, Minnesota, concluded that section 301.40(2)'s valuation proceeding is arbitration subject to the Uniform Arbitration Act.

> fraud, mistake in applying his own theory, misconduct, or other disregard of duty. An award will not be set aside merely because the court thinks the arbitrators erred either as to the law or the facts.

Koranda v. Austin Mut. Ins. Co., 397 N.W.2d 357, 361 (Minn. App. 1986) (quoting Cournoyer v. American Television and Radio Co., 249 Minn. 577, 580; 83 N.W.2d 409, 411 (1957); see also Eric A. Carlstrom v. Independent School Dist., 156 N.W.2d 479, 483 (Minn. 1977).

Clearly section 301.40(2) and Minnesota case law provided no jurisdiction to the district court to examine the merits of the arbitration panel's determination of the fair cash value of Miller's stock. The order of dismissal is AFFIRMED.

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Plaintiff-Appellant,	)	No. 86-2452
	)	
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[3] Section 301.40(2) stated in relevant part:

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In his amended complaint, Miller requested the court to decide whether section 301.40(2): (1) allowed discovery prior to the arbitration proceeding, (2) required the corporation to pay for appraiser's expenses and other expenses, and (3) allowed the right

to subpoena documents, to compel witnesses' attendance, to have witnesses testify under oath, and to cross examine witnesses, as well as other procedural rights. Both parties moved for summary judgment on the ground that there were no genuine issues of material fact as to the procedures required by section 301.40(2) to determine the fair cash value of a dissenter's shares in an arbitration proceeding.

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The district court properly dismissed Miller's challenge of the panel's determination. It did not have jurisdiction to examine the merits of that determination. Section 301.40(2) provides that "(t)he determination of a majority of the appraisers in good faith made shall be binding on all demanding shareholders and the corporation(.)" (Emphasis added). Miller presents no evidence that the appraisers acted in bad faith when they determined the value of his stock.

The district court found that the appraisal proceeding which section 301.40(2) contemplated is a non-judicial compulsory arbitration proceeding, to be conducted in accordance with the procedures set forth in the Minnesota Uniform Arbitration Act, Minn. Stat. An. SS 572.08-30 (West 1988), which was adopted in 1957.[4] Minnesota cases which interpret the Uniform Arbitration Act hold that when an issue is raised regarding the merits of an arbitrator's decision:

> (A)n arbitrator, in the absence of any agreement limiting his authority, is the final judge of both law and fact, . . . and his award will not be reviewed or set aside for mistake of either law or fact in the absence of

---

[4] The court was provided with an expert witness's analysis of the legislative history of section 301.40(2) and Minnesota case law to determine if that section contemplates an arbitration proceeding subject to the Uniform Arbitration Act. The expert witness, Professor Richard Ihrig of the William Mitchell College of Law in St. Paul, Minnesota, concluded that section 301.40(2)'s valuation proceeding is arbitration subject to the Uniform Arbitration Act.

> fraud, mistake in applying his own theory, misconduct, or other disregard of duty. An award will not be set aside merely because the court thinks the arbitrators erred either as to the law or the facts.

Koranda v. Austin Mut. Ins. Co., 397 N.W.2d 357, 361 (Minn. App. 1986) (quoting Cournoyer v. American Television and Radio Co., 249 Minn. 577, 580; 83 N.W.2d 409, 411 (1957); see also Eric A. Carlstrom v. Independent School Dist., 156 N.W.2d 479, 483 (Minn. 1977).

Clearly section 301.40(2) and Minnesota case law provided no jurisdiction to the district court to examine the merits of the arbitration panel's determination of the fair cash value of Miller's stock. The order of dismissal is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAYTON K. MILLER, III	)	
	)	
Plaintiff-Appellant,	)	No. 86-2452
	)	
v.	)	D.C. No. 83-418-T-RMB
	)	
PEAVEY COMPANY; CONAGRA, INC. corporations doing business in the state of Arizona,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: FERGUSON, LEAVY, Circuit Judges, and REDDEN,* District Judge

The appellees Peavey Company and ConAgra, Inc. petition for an award of attorneys fees and costs on appeal, pursuant to Federal Rules of Appellate Procedure 38 and 39(a) and (c), and Rule 39-1.6 of this circuit. They seek $227.50 in costs and attorneys' fees of $18,211.50 against pro se litigant Clayton K. Miller III. The petition is unopposed.

*Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

The appellees claim Miller's appeal was frivolous, thereby entitling them to fees and costs under Federal Rule of Appellate Procedure 38. An appeal is frivolous "when the result is obvious, or the arguments are wholly without merit.'" NLRB. v. Catalina Yachts, 679 F2d 180, 182 (9th Cir. 1982) (quoting Libby, McNeill and Libby v. City Nat'l Bank, 592 F.2d 504, 505 (9th Cir. 1978). The appellees claim Miller's appear is frivolous because he raised issues that were neither before the district court nor decided by the district court.

We decline to hold this appeal frivolous. The district court held it lacked jurisdiction to remand a report on the valuation of stock to an arbitration panel. We read Miller's appeal, despite its lack of legal skill, to challenge the district court's determination of its jurisdiction. We ruled on that issue, affirming the

district court. Because the district court's final judgment that it lacks jurisdiction is appealable, Miller's appeal was not wholly without merit.

The motion for costs and attorneys' fees on appeal is DENIED.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CLAYTON K. MILLER, III, an unmarried man, Plaintiff vs. THE PEAVEY COMPANY and CONAGRA, INC., corporations doing business in the state of Arizona, Defendants	)	No. CIV 83-418 TUC-RMB O R D E R

The Court finds that the arbitrators complied with the Court Order of February 27, 1984, and the procedures set forth under M.C.B.A. SS 301.40 and 310.44, in determining the value of plaintiff's stock.

From the determined value, the defendant is authorized to deduct $150.000 previously allowed as a sanction against the plaintiff. The remaining sum is to be paid to the plaintiff forthwith.

This matter is DISMISSED, each party to bear its own costs.

DATED this 17th day of July, 1986.

Richard M. Bilby
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CLAYTON K. MILLER, III Plaintiff vs. THE PEAVEY COMPANY and CONAGRA, INC., corporations doing business in the state of Arizona, Defendants	)	No. CIV 83-418 TUC-RMB JUDGMENT

This matter came on for hearing before this Court on February 16, 1984, upon motion for summary judgment by defendant Peavey Company ("Peavey") and the cross-motion of plaintiff Clayton K. Miller, III ("Miller") seeking a summary declaration of the rights and obligations of the parties under Minnesota Business Corporation Act SS 301.40 and 301.44.

The Court having heard and reviewed the written and oral arguments of counsel, and

the pleadings, affidavits and documents, and there being no issues of fact for determination, declares and determines the rights and obligations of the parties as follows:

1. Miller is a dissenting shareholder of Peavey within the meaning of M.B.D.A. SS 301.40 and 301.44 with respect to the merger of Peavey and a wholly-owned subsidiary of ConAgra that took place on or about July 20, 1982.

2. Pursuant to M.B.C.A. SS 301.40 and 301.44, Miller is entitled to a statutory appraisal proceeding to determine the fair cash value of the 1,100 shares of Peavey stock which he owns.

3. The appraisal proceeding contemplated by M.B.C.A. SS 301.40 and 301.44 is a non-judicial compulsory arbitration proceeding and is to be conducted in accordance with the

procedures set forth in the Minnesota Uniform Arbitration Act, Minn. Stat. Ch. 572.

4. Miller and Peavey is each required to nominate a disinterested appraiser to serve on the arbitration panel ("Panel"(which shall appraise Miller's shares in Peavey. That nomination shall occur within twenty (2) days of the entry of this Judgment.

5. The two appraisers so nominated shall then within twenty (20) additional days select a third appraiser to serve with them on the Panel.

6. Pursuant to M.B.C.A. ss 301.40 and 301.44, all three appraisers shall be disinterested persons who have no financial interest in or relationship to the parties nor have advised or consulted with the parties on any issues involved in this case.

7. Pursuant to the Minnesota Uniform Arbitration Act, neither Miller or Peavey shall have the right to conduct discovery

prior to or in connection with the appraisal proceeding. Miller's right to discovery is limited to those shareholders' inspection rights provided by M.S.A. S 301.34; "books of accounts" refers to all financial records of the corporation. The Panel of appraisers shall have the right to issue subpoenas for the production of whatever information it deems necessary to determine the fair cash value of Miller's shares.

8. Pursuant to M.S.A. S 572.94(b), the parties may take no depositions except for use at the appraisal hearing and then only with the written approval of the appraisers.

9. The Panel shall conduct a single proceeding to determine the fair case value of Miller's share sin Peavey. Within thirty (3) days of the termination of that proceeding, the Panel shall issue and serve upon Miller and Peavey, by certified mail, a written decision setting forth their

determination of the fair cash value of Miller's 1,100 shares in Peavey. In the event all three members of the Panel cannot agree on the value to be assigned to those shares, the decision of the majority of the Panel members shall control.

10. In determining the fair cash value of Miller's shares, the Panel shall consider all factors which it determines to be relevant.

11. Within ten (10) days of the service of the decision of the arbitration Panel, Miller shall tender to Peavey all of his shares. Within thirty (30) days thereafter Peavey shall pay to Miller the fair cash value of the tendered shares as determined by the arbitration Panel. These time periods shall be suspended in the event of an appeal from or other judicial challenge to the arbitration award and shall run from the final termination of any such proceeding.

12. Expenses and fees for the arbitration shall be paid pursuant to M.S.A. S 301.49(3). No expert witness' fees shall be awarded. Witness' fees shall be awarded on a mileage and per diem basis as determined by the Panel. The recovery of any costs against plaintiff after the Panel's ruling must be based upon its determination that the plaintiff's refusal to accept the original offer was arbitrary or vexatious or was otherwise not in good faith.

13. All taxable costs shall be paid by the party(s) against whom assessed directly to the members of the Panel and/or the opposing party within twenty (20) days of the date of service of the Panel's final written assessment of taxable costs.

14. This Court shall retain jurisdiction over this action for the purpose of issuing any further Orders as may be appropriate and

necessary until the delivery of the Panel's decision to the parties.

DATED: February 27th, 1984

Richard M. Bilby
United States District Judge

Part I. Financial Information

Peavey Company and Subsidiaries
CONSOLIDATED CONDENSES BALANCE SHEETS
(in thousands)

	April 30, 1982 (unaudited)	July 31, 1981
Current assets:		
Cash and short-term cash investments	$ 19,289	11,046
Segregated funds, net of customers' margin deposits of $41,419 and $36,481, respectively	2,205	1,059
Receivables, less allowance for doubtful accounts of $2,788 and $1,748, respectively	78,747	76,146
Inventories:		
Grain, flour and millfeed	102,476	62,798
Merchandise	88,070	87,204
Other	4,509	6,097
Other current assets	6,586	4,626
Total current assets	301,882	248,976
Property, plant, and equipment	218,399	208,800
Less accumulated depreciation and authorization	83,850	77,072
Property, plant and equipment, net	134,549	131,728
Other assets	7,446	4,572
Total Assets	$443,877	385,276
Current liabilities:		
Notes payable	$ 71,287	15,129

Current portion of long-term debt	3,157	3,213
Accounts Payable	80,436	78,547
Accrued expenses	19,930	21,851
Accrued taxes on income	2,691	4,913
Total current liabilities	177,601	123,653
Long-term debt	68,417	70,887
Deferred income taxes, net	15,737	14,367
Total liabilities	261,755	208,907
Minority interests in subsidiary	296	299
Stockholders' equity:		
Preferred stock, par value $100	3,366	3,366
Common stock, par value $2.50	14,942	14,338
Additional paid-in capital	2,299	2,393
Retained earnings	163,867	157,879
Deduct treasury stock, at cost	(1,994)	(1,096)
Equity adjustment for foreign currency translation	(654)	-
Total stockholders' equity	181,826	176,070
Total liabilities and stockholders equity	$443,877	385,276

*Restated for FAS 43 - See note 5.

See accompanying notes to consolidated condensed financial statements.

(3) In July 1982, Peavey Company, in a transaction accounted for as a purchase, was merged into ConAgra, Inc. Operations of Peavey Company have been included since the date of acquisition. The purchase price has tentatively been allocated to the assets and liabilities acquired on an estimated basis. Final allocations will be based on appraisals and are not expected to have a significant effect on the accompanying financial statements. The allocation of purchase price as reflected in the accompanying financial statements is as follows (in thousands)

Current Assets	$266,000
Current liabilities	169,000
Working capital	97,000
Property, plant and equipment	114,000
Other non current assets	3,000
Long-term liabilities assumed	(61,000)
Purchase price	$158,000

The following summary, on a pro forma basis, combines the consolidated results of operations of the company (1) for the twenty-six weeks ended November 28, 1982 with those of Peavey Company for this two months ended July 31, 1981; and (2) for the thirteen and twenty-six weeks ended November 29, 1981 with those of Peavey Company for its three and six months ended November 30, 1981, respectively.

	Thirteen Weeks Ended November 29, 1981	Twenty-Six Weeks Ended November 18, 1982	November 29, 1981
	(In thousands, except per share amounts)		
Net sales	$648,956	$1,374,424	$1,355,875
Net income	14,270	19,988	24,540
Income per common and common equivalent share:			
Primary	$ .77	$ 1.02	$ 1.32
Fully diluted	$ .76	$ 1.02	$ 1.31

In September of 1982, ConAgra completed the organization of a poultry company which will combine the United States poultry operations of ConAgra and Imperial Foods Limited. ConAgra and Imperial Foods each invested $18,000,000 and each received a 50% equity interest in the new company, Country Poultry, Inc. which will be managed by ConAgra.

November 18, 1986

Mr. Clayton Miller
4665 North Palisades
Tucson, Arizona 85715

Re: Clayton Miller v. Peavey Company

Dear Mr. Miller:

I have replaced Mr. Sangalis as the general counsel for Peavey Company. I thank you for your letter of November 16, 1986. Having reviewed my large file in this case, I too would like to bring the matter to a conclusion.

I look forward to your call on Friday, November 20, at 2:00 p.m. central standard time. I must caution you that I will be away from Minneapolis on Thursday, November 19 and

I will return Friday morning. If for any reason I have not returned to the office by 2:00 p.m., please leave a message with my secretary and I will promptly return your call later that afternoon. Thank you for your cooperation.

Very truly yours,

Jerold A. Gilbert
General Counsel

JAG/dlm/11186-5

November 16, 1986

C. Miller

602-749-5269

Peavey Corp.

Minn. Minn.

Mr. Sangalis:

Enclosed is a copy of Peavey's paper work filed Oct. 21st, 1986, with the 9th Circuit Court. Item #2 suggests we might settle.

May I call you Friday NOvember 20th at 2 PM Minn. time, to see if we can put this matter to rest.

I am in the final stages of re-mortgaging my house for a retainer. By the time some high priced lawyer with a huge ego gets done

FLEECING us both over the next 2 years - -
perhaps I can compromise my position.

I do not want to be played with again - so if we can talk Friday please advise.
Thank you,

C.K. Miller III

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAYTON K. MILLER, III	)	
	)	
Plaintiff/Appellant,	)	Docket No. 86-2452
	)	(No. CIV 83-418
	)	RMB)
	)	
vs.	)	RESPONSE TO MOTION
	)	FOR EXTENSION OF
	)	TIME, AND TO
	)	RECONSIDER ORDER
	)	DENYING
	)	PREBRIEFING
	)	CONFERENCE
	)	
PEAVEY COMPANY,	)	
	)	
Defendant/Appellee.	)	
	)	

Defendant/Appellee Peavey Company ("Peavey"), by and through its undersigned counsel, responds to the plaintiff/appellant's Motion for Extension of Time, and To Reconsider Order Denying Prebriefing Conference ("Motion") as follows:

1. The Motion is unclear as to which deadline(s) the appellant seeks to extend for 60 days. Moreover, in its Order of September

16, 1986, this Court has already denied a similar request for an extension based upon the appellant's earlier representation that 45 days would be enough time to locate an attorney.

2. Peavey would not object to a prebriefing conference, assuming that the conference was held as a vehicle for the exploration of settlement and the disposition of this appear prior to the submission of briefs in light of the following facts:

(a) The District Court's Judgment which determined the parties' rights was entered on

301.40 Rights of shareholders not assenting to retain corporate action

Subdivision 1. Objection to proposed amendment of articles. If a corporation has given notice to shareholders of a proposal to amend the articles of incorporation, which proposed amendment would substantially change the corporate purposes or would extend the duration of the corporation, a shareholder may, at any time prior to the date of the meeting at which such proposed amendment is to be voted upon, file a written objection to such amendment in the office of the secretary or president of the corporation and demand payment for all shares owned by such shareholder; provided, that such demand shall be of no force and effect if such shareholder votes in favor of the amendment, or at any time consents thereto in writing, or if the proposed amendment be not in fact effected.

Subd. 2. Appraisers. If, after such a demand by one or more shareholders, the corporation and one or more shareholders cannot agree upon the fair cash value of the shares at the time such amendment was authorized, such value shall be determined in a single proceeding by three disinterested appraisers, one of whom shall be named by the shareholders, another by the corporation, and the third by the two thus chosen. The appraiser named by such shareholders shall, in the event of disagreement among such shareholders, be selected by the holders of a majority of the shares with respect to which payment has been demanded. The determination of a majority of the appraisers in good faith made shall be binding on al demanding shareholders and the corporation, and if the amount so determined is not paid by the corporation within 30 days after it is made, such amount may be recovered in an action by any such demanding shareholder

against the corporation. The corporation shall not be required to it of the shares for which such payment was demanded and upon surrender of the certificate or certificates evidencing the same.

Subd. 3. Expenses. The appraisers' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid by the corporation except that all or any part of such costs and expenses may be apportioned and assessed against any or all of the demanding shareholders if a majority of the appraisers in good faith find that such demanding shareholders refused to accept an offer to purchase of the corporation and that such refusal was arbitrary or ambitious or otherwise not in good faith.

Subd. 4. Withdrawal of demand. Any shareholder making such demand may withdraw the demand at any time prior to the determination of the fair cash value of the shares by filing written notice of such withdrawal in the office of the secretary or president of the corporation.

Subd. 5. Payment, when not made. A shareholder shall not be entitled to payment for his shares under the provisions of this section unless the value of the corporate assets which would remain after such payment would be at least equal to the aggregate amount of its debts and liabilities exclusive of stated capital. Amended by Laws 1965, c. 504 S 9, eff. May 20, 1965.

APPENDIX "A"

S 301.44 Dissenting shareholders; rights

Subdivision 1. Demand for payment. If a domestic corporation has given notice to shareholders of a proposal to merge into or consolidate with any other corporation or corporations, a shareholder may, at any time prior to the date of the meeting at which such proposed merger or consolidation is to be voted upon, file a written objection to such merger or consolidation in the office of the secretary or president of the corporation and demand payment for his shares and have the fair cash value thereof determined as provided in section 301.10, the relevant provisions of which section shall be in all respects applicable; provided, that such demand shall be of no force and effect if such shareholder votes in favor of the merger or consolidation, or at any time consents thereto in writing, or if the proposed merger or consolidation be not in fact effected. The liability of such

corporation to such dissenting shareholder for the fair cash value of the shares so agreed upon or awarded shall also be a liability of the consolidated or surviving corporation, as the case may be.

Subd. 2. Failure to object deemed assent. Those shareholders of the constituent corporations who do not object in writing and demand payment for their shares pursuant to the provisions of subdivision 1 shall be deemed to have assented to the consolidation or merger, as the case may be, on the terms specified in the agreement of the consolidation or merger.

Amended by Laws 1951, c 98, S 10, eff. March 21, 1951.

APPENDIX "A"

Notes of Decisions

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1. In general

Arbitration award which awards a sum of money in satisfaction of various claims of the parties need not separately treat each claim or explain the arbitrator's reasoning process. Hilltop Const., Inc. v. Lou Park Apartments, 1982, 324 N.W.2d 236.

Arbitrator is permitted to interpret rules under which his decision is made. Haekenkamp v. Allstate Ins. Co., 1978, 265 N.W.2d 821.

An arbitrator, in the absence of any agreement limiting his authority, is final judge of both law and fact, including interpretation of terms of any contract. Children's Hospital, Inc. v. Minnesota Nurses Ass'n. 1978, 265 N.W. 2d 649.

Where arbitrators are not restricted by the submission to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law, they may make an award according to their own notion of justice without regard to the law, but where the arbitrators are so restricted, they have no authority to disregard the law. Metropolitan Waste Control Commission v. City of Minnetonka, 1976, 308 Minn. 385, 242 N.W.2d 830.

2. Vacation

Where issue of existence or scope of arbitration agreement is raised in judicial proceedings to vacate arbitration award, trial court is not bound by decision of arbitrator but must independently determine issue by ascertaining intent of parties from language of their written agreement and such other admissible evidence as may be submitted to resolve questions of law or fact. U.S.

Fidelity & Guaranty Co. v. Fruchtman, 1978, 263 N.W. 2d 66.

Where arbitrability of insurance coverage dispute is challenged in judicial proceedings to vacate arbitrator's award, such proceedings are de novo, trial court is not bound by arbitrator's determination, objecting party has burden of proving invalidity of arbitrator's award, and award must be vacated where arbitrator has clearly exceeded his powers. Id.

Award of arbitration would be ordered vacated where the arbitrators, acting under a restricted submission, exceeded their powers by making a compromise award unresponsive to the issue submitted. Metropolitan Waste Control Commission v. City of Minnetonka, 1976, 308 Minn. 385, 242 N.W. 2d 830.

3. Evidence supporting findings

Where transcript of arbitration proceeding showed no evidence to support finding that

there was physical contact between uninsured motor vehicle and vehicle in which claimant under automobile liability policy sought uninsured motorist insurance benefits, and where such physical contact was precondition according to terms of policy, arbitrator exceeded her powers in finding coverage under policy. U.S. Fidelity & Guaranty Co. v Fruchtman, 1978, 263 N.W.2d 66.

4. Review

Arbitrator's award is appropriate so long as interpretation can in some rational manner be derived from agreement, viewed in light of its language, its context, and any other indicia of parties' intention; only when there is manifest disregard of agreement, totally unsupported by principles of contract construction and law of shop, may reviewing court disturb award. AFSCME Dist. Council 96 v. Independent School Dist. No. 381, Two Harbors, App.1984, 351 N.W.2d 33.

Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1064

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

CLAYTON KENDALL MILLER, III,

Petitioner,

vs.

CONAGRA, INC. and PEAVEY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BRIEF IN OPPOSITION TO PETITION

Wm. S. Hawgood II
Marcia Horn Yavitz
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Telephone: (602) 229-5200
Counsel for Respondents

10pp

QUESTIONS PRESENTED FOR REVIEW

1. Given the fact that Miller's action in the district court sought only a declaratory judgment delineating the procedures attendant to the statutorily mandated arbitration proceeding, and the declaratory relief having been so granted, is the ultimate substance of the arbitrators' report properly at issue in this case?

2. Assuming that the arbitrators' report is properly at issue, is a unanimous decision rendered by an arbitration panel, appraising the value of stock pursuant to the Minnesota dissenting shareholder's statute providing for binding arbitration, subject--in the absence of any evidence of bad faith--to judicial review?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties appearing in the caption of this case were the only parties to the proceedings in the court of appeals. Pursuant to Rule 28.1 of the Supreme Court Rules, the following comprises the current list of all parent companies, subsidiaries and affiliates of Peavey Company and ConAgra, Inc.:

Ace Ltd. Bermuda
Aliexport S.A.
Antonio Luis Da Mata, Herdeiros, LDA.
Avipronto Sociedade Transformadora de Productos Alimentares, Ltda.
BDR (Grain) Limited
BDR (Sales) Limited
Berdex International, Inc.
Bioter S. A.
Bumi-Woodward Sdn. Bhd.
Canadian Harvest Process USA
Canadian Harvest Process (1986) Ltd. (owned by Ducon II)
Champaca Co. Ltd.
Compania Canaria de Peinsos, S.A.
ConAgra Internacional Comercio de Productos Agro-Alimentaras, Ltda.
ConAgra International, Inc.
ConAgra International, S.A.

ConAgra Uluslararasi Ortadogu Dis
Ticaret Anonim Sirketi
Ducon I
Ducon II
EWOS Bioter S.A.
Excel, Ltd. Bermuda
Fossil Creek Farms
Franz Albers GmbH, Hamburg
Geldermann Limited
Hansa - Muhle Verwaltungsge -
Sellchaft mbH
Hansa - Muhle Verwaltungsge -
Sellchaft mbH & Co. KG
Harbor Partners Limited
Partnership
Hoeing & Co. GmbH
Incosoja-Industrias Conjuntas de
Soja Ltda. Sao Paulo/Brasilien
Kurt A. Becher
Unterstutzungskasse GmbH
Lamb-Weston
Lion ConAgra
MCPA Task Force
Molecular Genetics
Nittoh Bion KK
NutriMex S.A. de C.V.
Park Hotel GmbH, Bremen
Plange Kraftfutterwerke GmbH
& Co. KG
Plange Kraftfutterwerke
Verwaltungs-gesellschaft mbH
ReCo Kraftfutterwerke GmbH
SIPCo International, Inc.
SIPCo Truckline, Inc.
Sabeco Kurt A. Becher Comercio
Industria, Ltda.
Sankyo Boeki K.K.
Sapropor S. A.
Swift Independent Corporation
Swift Independent Holding Company
Swift Independent Packing Company
Swift International Sales Corp.
Taisei Corporation Inc.

Trans-Agra Internacional S.A.
de C.V.
Trident Two Corporation
Val-Agri, Inc.
Willow Creek Talc, Inc.
Woodward and Dickerson Do Brasil
Representacao, Importacao and
Exportacao, Ltda.
Woodward & Dickerson Trading
Philippines, Inc.
1050 Sansome Corporation
24D Task Force

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9 U.S.C. §§1-14	29-30
9 U.S.C. §10	30
9 U.S.C. §11	30
28 U.S.C. §1291	18
28 U.S.C. §1332	1
Rules of the United States Supreme Court	
Rule 49.2	56

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported (Pet. App. at 11). The July 23, 1986 decision and order of the district court is also unreported (Pet. App. at 34).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1988. A petition for rehearing en banc was denied on August 25, 1988. The Petition for a Writ of Certiorari was filed on November 22, 1988. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1332. In affirming the district court's dismissal of Petitioner's action, the court of appeals held that contrary to Petitioner's contention, the district court had no jurisdiction to examine the merits of the arbitration panel's

determination of the fair cash value of Miller's stock (Pet. App. at 11).

Respondents submit that based on Minnesota law and this Court's decisions, this Court similarly should decline to examine and review the unanimous decision of an arbitration panel where Petitioner has failed to adduce evidence of bad faith.

Respondents further submit that, based upon the relief sought and obtained in the declaratory judgment proceedings below, the substance of the arbitration panel's valuation report is not properly (jurisdictionally) before this Court--just as it was not properly before the court of appeals.

STATUTES INVOLVED

The relevant provisions of the Minnesota Business Corporation Act §§301.40 and 301.44 as well as the

Minnesota Uniform Arbitration Act §§572.16 and 572.20 are set forth as Respondents' Appendix A ("Resp. App.") hereto.

STATEMENT OF THE CASE

1. The Peavey-ConAgra merger.

On July 20, 1982, defendant/respondent Peavey merged with a wholly-owned subsidiary of defendant/respondent ConAgra, Inc. (collectively referred to as "Peavey"). The transaction, a reverse triangular merger, carried a transaction price of $180 million. At the time of the merger, plaintiff/petitioner Clayton K. Miller, III ("Miller") owned 1,100 shares of the 5,874,242 shares of issued and outstanding Peavey stock.

Before the merger was announced, Peavey stock had traded at $18.00 per share on the New York Stock Exchange. By the day of the announced merger, Peavey

shares were publicly traded at $26.00 per share. As a shareholder, Miller was offered cash and/or ConAgra stock worth $30.00 per share in exchange for consenting to the merger and tendering his Peavey stock. Miller was the only one of Peavey's 2,552 shareholders who rejected the tender offer and dissented from the merger. Under the Minnesota dissenting shareholder's statute--§§301.40 and 301.44 of the Minnesota Business Corporation Act[1] ("M.B.C.A.")--a dissenting shareholder can sell his stock to the corporation for "fair cash value." If the shareholder and the corporation cannot agree on a price for the stock, the fair cash value of the stock at the time of the merger is to be determined by three disinterested appraisers in a

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1 Sections 301.40 and 301.44 have been superseded by the Minnesota Business Corporation Act of 1984. The new statute does not apply retroactively.

proceeding pursuant to M.B.C.A. §301.40(2).

After Peavey received Miller's dissent, it tried to negotiate a fair price for Miller's shares. Miller refused to negotiate or to set an asking price for his shares. The matter thus became one for arbitration. Even after the arbitrators were empaneled and had informed the parties that the expense attendant to an appraisal proceeding would likely exceed the value of Miller's stock (and thus requested the parties to negotiate a settlement), Miller would not cooperate.[2] Throughout the course of his

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[2] Peavey's final offer of $39,000.00 for Miller's 1,100 shares was (1) equal to the $30.00 per share tender offer price accepted by all other shareholders coupled with additional compensation for expenses incurred by Miller in pursuing his dissenting shareholder's rights; (2) significantly greater than the $26.00 per share price at which Peavey stock was publicly traded on the date of the merger; and (3) almost double the $18.00

(footnote continued)

dispute with Peavey, Miller has adamantly refused to negotiate a price for his stock.

2. Miller's declaratory judgment action.

The parties' disagreement as to how the arbitration proceeding was to be conducted led Miller to bring a declaratory judgment action against Peavey in the United States District Court for the District of Arizona on June 25, 1983. Miller's First Amended Complaint, filed October 13, 1983, (attached hereto as Resp. App. B) requested the district court to delineate the procedures attendant to a dissenting shareholder's appraisal proceeding pursuant to M.B.C.A. §§301.40 and 301.44. Miller's First

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(footnote continued from previous page) per share price at which Peavey stock was publicly traded immediately prior to the announcement of the merger. Miller rejected all of Peavey's offers and never made a counteroffer.

Amended Complaint sought neither monetary nor equitable relief beyond the court's issuance of a declaratory judgment. Nor did Miller ask the court to decide issues pertaining to the value of Miller's stock. Rather, Miller requested the court to resolve issues relating to the procedures that would ultimately govern the appraisal proceeding -- i.e., whether §301.40(2) (1) allowed discovery prior to the arbitration proceeding; (2) required Peavey to pay for the costs associated with the arbitrators and the appraisal proceeding; and (3) allowed the right to subpoena documents, to compel witnesses to attend, to have witnesses testify under oath, to cross examine witnesses as well as other procedural rights. (Resp. App. B-18 at XXIII.)

3. The district court's judgment resolving the procedural issues governing the appraisal of Miller's stock.

On November 23 and December 27, 1983, Peavey moved and Miller cross-moved for summary judgment, asserting that there were no genuine issues of material fact as to the procedures attendant to an appraisal under M.B.C.A. §301.40(2). The parties did not request that the district court determine the value of Miller's stock in Peavey. On February 27, 1984, the United States District Court for the District of Arizona, Chief Judge Richard M. Bilby, presiding, entered its judgment setting forth the procedures that would govern the appraisal of Miller's stock by an arbitration panel (Pet. App. at 36). The district court retained jurisdiction over the matter only "for the purpose of issuing any further Orders as may be appropriate and

necessary until the delivery of the [arbitrators'] decision to the parties." (Id. at 41-42, ¶14; emphasis supplied.) Miller did not appeal that judgment to the court of appeals.

4. The arbitration panel and its report.

The parties selected a panel of three arbitrators in accordance with the Minnesota dissenting shareholder's statute (one designated by Miller, one chosen by Peavey and the third jointly selected by the two arbitrators). The arbitration panel's unanimous decision--culminating a two-year appraisal proceeding which cost Peavey over $94,000.00--is contained in a 145-page arbitrators' report transmitted to the district court on April 22, 1986 and made a part of the record on appeal by order of the district court of March 24, 1988. The arbitrators' report, titled "Peavey Company Valuation as of

July 20, 1982 by Court-Appointed Arbitration Panel,"[3] dated March 31, 1986, concluded that the value of Miller's stock at the time of the merger was $30.00 per share--exactly the price offered by ConAgra to Peavey's shareholders at the time of the merger.

The arbitrators based their decision on (1) the merger negotiations among Peavey, ConAgra and their financial advisors in arriving at the transaction price; (2) the historical performance and future prospects of Peavey; (3) the comparative value of other similar equity investments; and (4) the relationship of Peavey's common shares to the value of the Company's underlying assets less liabilities if the assets were sold

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3 Based on the manner in which the arbitrators were chosen (viz., pursuant to the Minnesota dissenting shareholder's statute), the title of the report is inaccurate. The district court did not select the arbitrators.

separately and apart from the business. The arbitrators interviewed members of Peavey's top management, Peavey's financial advisor and ConAgra's chief executive officer and analyzed Goldman Sachs' "fairness opinion" (which concluded that the merger and transaction price were fair from a financial viewpoint).

The arbitrators' report concluded:

> (a) Peavey was struggling in the flour business, and returns on its retail business were subpar. No rebound in the grain merchandising business was expected for three to five years, and no buyer was interested in Peavey other than ConAgra.
>
> (b) A year before the merger, Peavey's stock had traded at an average of $23.47 per share

(with an 1982 midpoint of $20.50), an amount lower than Peavey's book value of the stock. This reflected the fact that the return on shareholder equity had been "low, sub-par, and declining." Peavey's market price had dropped below book value because the prospects for future returns were deemed by the market to be inadequate to support Peavey's level of historical investment.

(c) The merger price of $180 million was almost identical to Peavey's book value. There was no inconsistency in the merger price not representing a premium over book value in light of the fact that Peavey's historical returns had resulted in the market price generally well below

book value. Further, the merger price compared favorably to the price-to-earnings ratios which Peavey achieved in the market.

(d) Peavey's directors owned or controlled 19% of its stock prior to the merger. No special deals or "golden parachutes" had been given to the directors. By selling their stock for $30.00 per share, the directors, as Peavey shareholders, had maximized their investment.

(e) Two banking institutions owned 30.3% of Peavey's stock in a fiduciary capacity. It was telling that these fiduciaries considered the merger to be in the best interests of their clients.

(f) Based on an in-depth net asset evaluation, the merger price of $30.00 was fair relative to the underlying assets. Miller's contention that the value of Peavey's underlying assets had a net asset value equal to their cost of replacement less an allowance for accumulated depreciation overlooks functional and economic obsolescence as well as the special purpose and nature of most of Peavey's fixed assets.

(g) The value of Peavey's underlying assets affect the value of stock either (1) to the degree to which the assets produce income or (2) to the degree to which the assets can be separated from the operating business and exchanged for cash.

The value of Peavey's assets was subject to the same downward pressures as its equity securities.

(h) To the extent assets were retained by Peavey, their value would be reflected in the market price of Peavey's stock based upon the projected income-producing ability of those assets. Alternatively, the net value of Peavey's assets could be evaluated through their hypothetical liquidation. A liquidation creates a "buyer's market" and would result in a number of liabilities not yet on the balance sheet, such as unfunded pension liabilities. Assuming arguendo that Peavey could have sold all of its assets at

historical cost and that there would be no unfunded liabilities ("optimistic" assumptions), the $180 million merger price favorably compared with liquidation estimates ranging from $106 million to $181 million. Thus, nothing suggests that Peavey's assets could have been liquidated with a resulting per share value proceeds, net of all costs and liabilities, equal to or greater than the transaction price.

While Miller steadfastly had refused to negotiate with Peavey and had demanded to proceed to arbitration, Miller refused to attend the arbitration proceeding. Miller did not provide the arbitrators with any information to buttress his contention that Peavey's net assets had an aggregate value which exceeded the

transaction price. Further, Miller never informed the arbitrators what he considered to be the fair cash value of his shares.

5. The district court's order of dismissal.

Miller expressed disagreement with the arbitration panel's determination of his stock's value at a June 23, 1986 status conference before the district court. Miller claimed that the appraisal proceeding was unfair because it had not determined Peavey's net asset value. He requested the district court to remand the report to the arbitrators and order them to use a different appraisal method. On July 23, 1986, the district court dismissed Miller's action, ruling that the arbitrators had complied with M.B.C.A. §301.40(2) as well as its February 27, 1984 declaratory judgment (Pet. App. at 34). The district court

did not examine the merits of the arbitration panel's determination of fair cash value.[4]

6. Miller's appeal to the Ninth Circuit.

On August 13, 1986, Miller filed an appeal from the district court's order of July 23, 1986 in the United States Court of Appeals for the Ninth Circuit. While Miller had been represented by counsel throughout the proceedings before the district court, he appealed pro se to the Ninth Circuit. The matter was submitted without oral argument. The Ninth Circuit had jurisdiction of the appeal pursuant to 28 U.S.C. §1291 (appellate review of final decisions of district courts).

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4 The district court had retained jurisdiction of the case, following its entry of declaratory judgment, solely for the purpose of monitoring the implementation of the arbitration procedures which were the subject of both the declaratory judgment action initiated by Miller and the district court's resulting ruling. (Pet. App. at 41-42.)

In its decision dated April 29, 1988, the Ninth Circuit affirmed the district court's decision, holding that: "Clearly, Section 301.40(2) and Minnesota case law provided no jurisdiction to the district court to examine the merits of the arbitration panel's determination of the fair cash value of Miller's stock" (Pet. App. at 20). On August 25, 1988, Miller filed a petition for rehearing en banc, which was unanimously denied. Miller's Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The court of appeals' decision does not conflict with any decision of this Court or any other federal court of appeals. An important question of federal law is not at issue here. At most, this case only concerns a challenge to binding arbitration under the former

Minnesota dissenting shareholder's statute. In actual fact, this case, as pleaded, involves far less. It concerns the proper procedures to be used in the arbitration process. The district court ruled upon those procedures, and that ruling is not in dispute before this Court.

2. Miller views this case as a vehicle for the clarification and preservation of shareholders' rights. (Pet. at 7.) However, the court of appeals declined to reach the issue of the merits of the arbitrators' decision as to the value of Miller's stock. Rather, the court of appeals affirmed the dismissal of the case solely on the narrow basis that it lacked jurisdiction absent a showing by Miller of fraud or bad faith on the part of the arbitrators.

3. The questions Miller presents for review are divorced not only from the record before the lower courts but also from those courts' decisions.

INTRODUCTION

Under Minnesota law, Miller demanded and received a full appraisal proceeding to determine the fair market value of his shares as of the time of the merger. The district court lent its assistance in clarifying the procedures applicable under Minnesota law. After two years and over $94,000.00 in appraisal expenses to Peavey, the three appraisers--including the appraiser chosen by Miller--agreed that the $30.00 per share offer fairly represented the value of the Peavey stock.

Long after the district court had entered its declaratory judgment, Miller

asked the court to instruct the arbitrators to reappraise the shares in the fashion preferred by Miller, namely, an item by item physical appraisal of each item of physical property (from pencil sharpeners to silos) owned by Peavey. The district court found that the arbitrators had complied with the Minnesota dissenting shareholder's statute as well as its declaratory judgment governing the appraisal proceeding and dismissed Miller's Complaint. The court of appeals affirmed.

Miller's Petition should be rejected as a matter of law because (1) his requested relief far exceeds the limited focus of the case before the district court, and (2) the binding arbitration was carried out in good faith. Miller's Petition should be rejected as a matter of conscience because the $30.00 price

offered by ConAgra was fair. It was above market value. It was approved by Peavey's board of directors and independent investment bankers. The same price was offered to all shareholders--large and small--and all accepted the offer (except Miller). Miller thereafter received the full appraisal to which he was entitled.

Miller interprets his string of defeats in this action as a demonstration that the system is "fixed." If anything, this case demonstrates just how far the system goes to safeguard the rights of individual shareholders. Miller's view is that "everyone is out of step but Miller"; however, his arguments do not stand up to legal or factual scrutiny.

I. MILLER'S PETITION IS JURISDICTIONALLY DEFECTIVE BECAUSE IT RAISES ISSUES THAT WERE NOT BEFORE THE DISTRICT COURT.

Miller's First Amended Complaint in this action sought declaratory relief for the sole purpose of clarifying procedural issues relating to the manner of conducting the dissenting shareholder arbitration proceedings. (Resp. App. B-18 at XXIII.) The declaratory relief which Miller sought was granted by the district court by declaratory judgment entered February 27, 1984. (Pet. App. at 36.) In turn, the district court retained post-judgment jurisdiction of the case for the limited purpose of assuring that the arbitration proceedings were conducted in accordance with the court's February 27, 1984 Judgment. (Id. at 41-42.) The court, by order of July 23, 1986, concluded that they were. (Pet. App. at 34.)

The issue of whether Miller's stock was properly valued by the arbitration panel was not the subject of Miller's action. It was not ruled upon by the district court. Nonetheless, over the objections of Peavey, the court of appeals erroneously treated Miller's appeal as if the issue had been properly raised in the district court. In fact, the substantive issue of the stock's value was not before the district court, was not properly before the court of appeals, and is not properly before this Court. For this reason alone, Miller's Petition should be denied.

However, because (1) Miller's Petition is based entirely upon the stock valuation issue and (2) the Ninth Circuit ignored Peavey's argument that that issue was not properly under consideration,

Peavey responds--though regretfully--to the valuation arguments raised by Miller.

II. MILLER PROVIDES NO SUPPORT FOR HIS ASSERTION THAT THE ARBITRATORS' REPORT IGNORED FEDERAL LAW AND GENERALLY ACCEPTED METHODS OF VALUING SHARES.

Miller repeatedly charges that the arbitration conflicts with federal law and generally accepted appraisal procedures (Pet. at 2, 3, 4). Yet, nowhere in his Petition does he support these assertions. Miller cites no federal laws that have supposedly been violated.[5] Likewise, Miller does not adduce authority for the proposition that the arbitrators ignored generally accepted appraisal procedures.[6] Indeed, the

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5 As a dissenting shareholder to the merger of a Minnesota corporation, Miller asked for and received an appraisal pursuant to Minnesota law (M.B.C.A. §§301.40 and 301.44), not federal law.

6 The court of appeals refused to review the merits of the arbitrators' decision since Miller presented no (footnote continued)

closest Miller comes to providing facts to support his summary charge that "the accounting data suggests value over the $30.00 per share my shares are supposed to be worth" (Pet. at 3) is a citation to the "Addendum SEC filings, page 25 and 26." (Id. at 17.) While Peavey's unaudited financial statements showed assets greater than the purchase price ($443 million vs. $180 million), liabilities of $262 million were also reflected. The bottom line of assets minus liabilities, denominated in the financial statements as "shareholders' equity," was $182 million--virtually

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(footnote continued from previous page) evidence of bad faith or fraud (Pet. App. at 18). Peavey and ConAgra support the court of appeals' position that there is no jurisdiction to review the merits of the arbitrators' report in the absence of a showing of fraud or bad faith, and argue, alternatively, that the conclusion of the arbitrators was completely meritorious.

identical to the $180 million merger price.

In contrast to Miller's superficial and emotionally charged analysis, the arbitrators' report demonstrates a thoughtful and well-reasoned value analysis. In unanimously concluding that the $30.00 per share represented the fair value for Peavey stock as of July 20, 1982, the three disinterested appraisers (one appointed by Miller) relied on a variety of methods to value the shares at the time of merger. (St. of Case at 10-16.) Each of the criteria the arbitrators applied was analyzed in detail in the course of their lengthy report. Miller's theory that a physical appraisal should have been performed for each item owned by Peavey in 1982 was specifically considered and rejected by

the arbitrators as economically invalid. (Id. at 14-16.)

III. MILLER FAILS TO SUPPORT HIS CHARGE THAT THE MINNESOTA LAW PROVIDING FOR BINDING APPRAISAL IS UNCONSTITUTIONAL.

Again, respondents are left to their own imagination as to the basis of Miller's charge that the Minnesota appraisal law is unconstitutional. (Pet. at 3.) Miller cites no particular constitutional provision, nor any relevant judicial decision.[7] Moreover, it was Miller--not Peavey--who invoked the very statutes that he now attacks as unconstitutional.

The constitutionality of Minnesota's binding appraisal procedure may be established by reference to a federal analogue, the Federal Arbitration Act

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[7] For purposes of this discussion, Peavey assumes that Miller is referring to the United States Constitution, though this is not necessarily clear.

(9 U.S.C. §§1-14). Like the Minnesota Act, the decision of the arbitrators under the Federal Arbitration Act is final and binding. An arbitration award under the Federal Arbitration Act may be vacated only if (a) the award was procured by fraud, corruption, or undue means; (b) there was evident partiality or corruption on the part of the arbitrators; (c) misconduct of the arbitrators prejudiced the rights of any party; or (d) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made. (9 U.S.C. §10.) Cf. Minnesota Uniform Arbitration Act, §572.16. 9 U.S.C. §11 permits the modification or correction of an award if there is a material miscalculation, a mistake of description, or an imperfection in form. These standards have

consistently been applied by the federal courts without any suggestion that the Federal Arbitration Act fails to pass constitutional muster. See, e.g., Sentry Life Ins. Co. v. Borad, 759 F.2d 695 (9th Cir. 1985), The Hartbridge, 57 F.2d 672 (2d Cir. 1932), cert. denied, sub nom. Munson S.S. Lines v. North of England S.S. Co., 288 U.S. 601, 77 L. Ed. 2d 977, 53 S. Ct. 320 (1933).

Just as Minnesota courts have consistently upheld the validity of binding arbitration, so too has this Court. United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. _____, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987).[8] In holding that the Fifth Circuit Court of Appeals had exceeded its authority in vacating an arbitrator's

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[8] The reasoning of Misco, while in the context of collective-bargaining arbitration, has equal application to this action.

award and in substituting facts of its own, the Court explained:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. . . . But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of its authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

98 L. Ed. 2d at 299. Courts therefore have "no authority to disagree with" the arbitrator's "honest judgment."[9]

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[9] An arbitrator's award should thus be final and not subject to judicial second-guessing unless there is fraud or dishonesty (98 L. Ed. 2d at 302) or where an arbitrator's judgment is contrary to well defined and dominant public policy. W.R. Grace & Co. v. Local Union 759, Int'l. Union of the United Rubber Workers, 461 U.S. 757, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983).

Misco narrowly construes the public policy exception. Vague and amorphous notions of public policy should not (footnote continued)

98 L. Ed. 2d at 299. Miller's claim that Minnesota's binding appraisal statute is unconstitutional is thus entirely unsupported.

IV. MILLER'S POSITION IS NOT SUPPORTED BY SMITH V. VAN GORKOM.

Miller complains that the district court and the court of appeals overlooked Smith v. Van Gorkom. (Pet. at 7.) One possible reason, in addition to the fact that Miller never cited Van Gorkom to the

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(footnote continued from previous page) disturb an arbitrator's judgment. 98 L. ED. 2d at 302. The Court determined that the public policy reasons justifying a court's refusal to enforce an arbitration award must be rooted in "well defined and dominant . . . 'laws and legal precedents and not from general considerations of supposed public interests.'" Id., quoting Muschany v. United States, 89 L. Ed. 744, 756 (1945). Miller's peculiar notions of public policy (wholly beyond the record in this case) and his self-described appointment to protect beleaguered shareholders from the "International Bankers" do not reasonably fit within any cognizable public policy.

court of appeals, is that Van Gorkom is completely irrelevant to Miller's action.

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), evaluated the business judgment rule in the context of a board of directors' decision to recommend a merger. The Delaware Supreme Court held that members of the board of directors were not immunized from personal liability by the business judgment rule when they were grossly negligent in their review and analysis of the proposed merger.

In contrast, Miller's action is not against a board of directors. He is seeking to remand an appraisal conducted under M.B.C.A. §301.40(2). The standard of review for such an appraisal is not the business judgment rule, under Delaware law, but the Minnesota law for review of appraisal and arbitration,

which involves a fraud and bad faith standard. Hence, Van Gorkom is inapposite to Miller's case.

Miller apparently attempts to fit the square peg into the round hole by misciting Van Gorkom. He claims that in Van Gorkom:

> The court determined that an appraisal of a shareholder stock that was less than book value and ignored such factors as accumulated depreciation was questionable.

Pet. at 13. In reality, the failing addressed by the Delaware Supreme Court was that the directors of TransUnion never utilized any valuation study, neither by an independent investment banker (as utilized by the Peavey directors) nor by outside experts (as conducted for Miller's shares) nor by even its own management. 488 A.2d at 876. Instead, the TransUnion

> Board had not made any study of the intrinsic or inherent worth

> of the Company; nor had the board even discussed the inherent value of the Company prior to approving the merger . . .

Id. at 891. It was the absence of a valuation study, combined with misleading proxy statements that implied that the Board knew the value of the Company, that doomed the TransUnion directors. Id. Contrary to Miller's contention, the Delaware Supreme Court did not examine the merits of an appraisal report. There was simply none to examine.[10] Van Gorkom is thus irrelevant to Miller's contentions.

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[10] Miller's references to the Delaware court's findings concerning the appraised price being below book value and ignoring accumulated depreciation are nowhere to be found in Van Gorkom. Moreover, the significance of this point is difficult to understand where the $180 million paid to Peavey shareholders was virtually identical to Peavey's book value. (St. of Case, supra at 12.)

V. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT LACKED JURISDICTION TO EXAMINE THE MERITS OF THE ARBITRATORS' DECISION.

A. Minnesota Law Precludes Judicial Review Of Binding Arbitration Unless A Showing Is Made That The Arbitrators Acted In Bad Faith.

Like many states, Minnesota has adopted legislation protecting the rights of shareholders who dissent from mergers and consolidations. The Minnesota dissenting shareholder's statute permits a dissenting shareholder to demand an appraisal of the "fair cash value" of his stock. M.B.C.A. §301.44. Fair cash value is determined by three appraisers, one of whom is named by the shareholder, another by the corporation, and the third who is chosen by the other two. M.B.C.A. §301.40(2).

Miller demanded an appraisal pursuant to M.B.C.A. §§301.40 and

301.44.[11] Acting pursuant to Minnesota law, as well as the district court's elaboration of the applicable statutory procedures, the arbitrators determined unanimously that the fair cash value of Miller's shares, at the time of merger, was $30.00 per share. As a Minnesota corporation, Peavey was bound by the Minnesota appraisal regimen and by the arbitrators' determination.[12] So, too, is Miller.

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[11] The district court found that the legislative history of M.B.C.A. §301.40(2) and Minnesota case law contemplated that the appraisal proceeding would be subject to the Minnesota Uniform Arbitration Act, Minn. Stat. Ann. §§572.08-572.30.

[12] By its terms, Minnesota's dissenting shareholder appraisal process is binding. M.B.C.A. §301.40(2) states:

> The determination of a majority of the appraisers in good faith made shall be binding on all demanding shareholders and the corporation. . . .

(Emphasis supplied.)

The Minnesota courts have frequently examined the nature of binding non-judicial determinations in the context of arbitration proceedings. Their consistent finding is that, under Minnesota law, courts cannot examine the merits of the arbitrators' decision. Even in the face of a mistake of law, Minnesota courts refuse to invade the province of the arbitrators. City of Bloomington v. Local 2828 of the American Federation of State, County & Municipal Employees, 290 N.W.2d 598, 602 (Minn. 1980).[13] In David A. Brooks Enterprises, Inc. v.

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13 See also Ozark Airlines, Inc. v. National Mediation Board, 617 F. Supp. 400, 402 (D.C. Mo. 1985) aff'd in part, rev'd in part on other grounds, 797 F.2d 557 (8th Cir. 1986) (The common law arbitration principle of functus officio precludes the courts and the arbitrators from redetermining the merits of an award.); Air Line Pilots Association v. Northwest Airlines, Inc., 498 F. Supp. 613, 618 (D. Minn. 1980) (The court cannot reexamine the merits of an arbitrator's award.)

First Systems Agencies, 370 N.W.2d 434 (Minn. App. 1985), the Minnesota Court of Appeals considered an arbitrator's award of prejudgment interest which was at odds with a Minnesota statute. 370 N.W.2d at 436. In confirming the arbitrator's decision, the court cited "strong preference in Minnesota for upholding the finality of an arbitrator's award" and held that an arbitrator's award is "not impeachable for a mistake of law" in the absence of bad faith or failure to exercise honest judgment. Id. See also David Co. v. Jim W. Miller Const., Inc., 428 N.W.2d 590, 593 (Minn. App. 1988) ("An award may not be overturned, even if a court believes it to be incorrect.").

While Miller claims without support that the arbitrators' report is substantively flawed, the district court properly refused to review that report.

Simply put, under Minnesota law, courts are not permitted to impose their own judgment of whether a decision pursuant to a binding appraisal is complete, accurate or fully substantiated.

The Minnesota Supreme Court has expressed this precept of judicial non-interference in unequivocal terms:

> The arbitrators make the final determination of all questions submitted to them whether legal or factual. The court will not overturn these conclusions even if it believes the arbitrators made an incorrect conclusion. If arbitrators' decisions were subject to reconsideration by the courts, arbitration proceedings would work merely to delay final decisions of controversies rather than bring them to speedy resolution.

Eric A. Carlstrom Construction Co. v. Independent School District No. 77, 256 N.W.2d 479, 483 (Minn. 1977), quoting Grudem Brothers Co. v. Great Western

Piping Corp., 297 Minn. 313, 316, 213 N.W.2d 920, 922 (1973).[14]

The federal courts have also considered the limited scope of judicial review of a binding arbitration permitted under Minnesota law. For example, in Sanitary Farm Dairies, Inc. v. Gammel, 195 F.2d 106 (8th Cir. 1952), the Eighth Circuit Court of Appeals considered an attack on an appraisal to determine net earnings. The district court examined the merits of the appraisal and held that the appraised values were inadequate. However, the Eighth Circuit Court of Appeals reversed, holding that, under

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[14] See also Koranda v. Austin Mut. Ins. Co., 397 N.W.2d 357, 361 (Minn. App. 1986); Kostrzewski v. Pennsylvania General Ins. Co., 364 N.W.2d 910, 911 (Minn. App. 1985); AFSCME Council 65, Local Union 667, Aitkin County Courthouse Employees, AFL-CIO v. Aikin County, 357 N.W.2d 432, 436 (Minn. App. 1984) (reversing trial court decision to vacate and remand arbitration award as "invad[ing] the jurisdiction of the arbitrator").

Minnesota law, the effect of submitting to an appraisal was to leave the parties:

> [W]ithout any right to escape such accounting result as might thus be produced, except as that result could be claimed to rest on fraud or on mistake so gross as to have amounted to legal irresponsibility in the undertaking.

Id. at 111. The legal effect of delegating the matter to the appraiser was to entrust the valuation "to the judgment, discretion and skill of the selected expert." Id. at 113. Under Minnesota law, the "appraisal result cannot be judicially examined as a mere question of adequacy or inadequacy of amount but only as an issue of moral infirmity. . . ." Id. at 114.

There is a compelling public policy reason for judicial deference to an arbitration award:

> The overriding purpose of the Arbitration Act is to encourage an informal, speedy, and relatively inexpensive resolution of

> disputes arising out of commercial transactions. . . . (Citation omitted.) When the parties have agreed to avail themselves of the benefits of arbitration, judicial interference should be kept to a minimum.

AFSCME Dist. Coun. 96 v. Ind. Sch. Dist. 381, 351 N.W.2d 33, 35 (Minn. App. 1984). The court of appeals' conclusion that the district court lacked jurisdiction to review the arbitrators' decision in the absence of evidence that the arbitrators had acted in bad faith is thus richly supported by Minnesota case law.

B. Miller Adduced No Evidence That The Arbitrators Acted In Bad Faith.

In affirming the district court, the Ninth Circuit concluded that:

> Miller presents no evidence that the appraisers acted in bad faith when they determined the value of his stock.

Pet. App. at 28. This conclusion is sound. Miller contended before the court

of appeals that the appraisers erred in relying on interviews with top executives of Peavey, ConAgra and Goldman Sachs. Miller also attacked the asset evaluations performed by the appraisers for their failure to engage in a physical appraisal of each particular asset owned by Peavey in 1982.[15] However, Miller has never adduced evidence of moral infirmity, bad faith or fraud on the part of the arbitrators. The burden of proof to set aside an arbitration award is a "clear showing the arbitrators were unfaithful to their obligations." David Co. v. Jim W. Miller Const., Inc., 428 N.W.2d 590, 593 (Minn. App. 1988)

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[15] The arbitrators addressed and rejected Miller's demand for a physical appraisal, concluding that such an evaluation would overlook functional and economic obsolescence as well as the special purchase and nature of most of Peavey's fixed assets. (St. of Case at 14.) Of course, such an appraisal would also be prohibitively expensive.

(emphasis supplied). As the court of appeals observed, Miller merely "asked the district court to remand the report to the panel and order it to use a different appraisal method." (Pet. App. at 27.)

VI. MILLER FAILED TO DEMONSTRATE THAT A RESUBMISSION TO THE ARBITRATORS WAS JUSTIFIED UNDER THE MINNESOTA UNIFORM ARBITRATION ACT.

A. The Arbitrators' Decision Was Not Imperfect In Form And Contained No Evident Miscalculation.

The power to resubmit an arbitrator's award for correction or modification is governed by statute. See International Union of Electrical & Machine Workers of America, Local No. 1140 v. Portec, Inc., 228 N.W.2d 239, 241 (Minn. 1975) ("The district court's power to vacate or modify an arbitrator's award is purely statutory."). Minn. Stat. Ann. §572.16 provides, in relevant part, that:

> On application of a party or, . . . on submission to the

> arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in clauses (1) and (3) of Subdivision 1, Section 572.20, or for the purpose of clarifying the award. . . .

The grounds stated in Minn. Stat. Ann. §572.20, Subd. 1, clauses (1) and (3) are as follows:

> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> . . . .
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Minn. Stat. Ann. §572.20, Subd. (1) (1978). Both clauses are "limited on their face to technical errors and irregularities in the award which do not affect the merits." Portec, supra at 243. Miller's request that the appraisal of his stock be remanded for correction

fails to meet either standard of Minnesota Uniform Arbitration Act §572.20. There is no evident miscalculation, nor is the award imperfect as a matter of form. Miller does allege that the arbitrators failed to undertake a physical asset appraisal; however, the district court's judgment of February 27, 1984, from which Miller did not appeal, did not require such an appraisal. Rather, the court provided that the arbitrators had discretion to select an appropriate approach to valuation:

> [I]n determining the fair cash value of Miller's shares, the panel shall consider all factors which <u>it</u> determines to be relevant.

(Pet. App. at 40, ¶10; emphasis supplied.) Miller's failure to appeal from the February 27, 1984 judgment estops Miller from attacking the arbitrators for failing to undertake a

physical asset appraisal. The judgment entered by the district court provided the arbitrators with discretion to consider the factors they deemed relevant. This was the "submission to the arbitrators by the court under such conditions as the court may order." Minn. Stat. Ann. §572.16.[16]

Having set forth the procedures for the arbitrators to follow, and in the absence of any showing of fraud or misconduct, or mistakes in calculation or form, the district court's limited role upon Miller's request for a remand was to determine whether the panel had complied with the district court's prior judgment.

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16 Rather than appealing from this judgment, Miller elected to permit the arbitration panel to work for two years, at an expense to Peavey of over $94,000.00. Then, after the arbitrators rendered their decision, Miller asked for a remand on the basis that they used their discretion as instructed by the district court, and as contemplated by Minnesota law.

Simply put, Miller has provided no legal basis to justify judicial interference with the arbitrators' decision. Before the court of appeals, and again in his Petition, Miller points to no fraud or evident miscalculation by the appraisers. At most, Miller has shown that the arbitrators, acting on the basis of their own informed judgment, failed to give credence to Miller's theories of valuation. Even if this were a mistake, which it was not, it was one which the arbitrators were entitled to make.

The district court thus acted properly in declining Miller's invitation to review the merits of the arbitration panel's valuation decision, and the Ninth Circuit correctly concluded that the district court was without jurisdiction,

under Minnesota law, to engage in such an examination.

B. The Minnesota Uniform Arbitration Act Bars Miller's Untimely Request To Remand The Arbitrators' Decision.

Minnesota law provides that a party has 20 days from the delivery of the arbitrator's decision to request that the court resubmit the award to the arbitrators for "vacating or modifying or correcting . . ." Minn. Stat. §572.16. The Minnesota courts strictly enforce this 20-day rule. In Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182, Crosby-Ironton, 285 N.W.2d 667, 670 (Minn. 1979), the Minnesota Supreme Court refused to examine the claimed grounds for reexamining a labor arbitration award because the objecting party had failed to apply for resubmission of the matter within the statutorily mandated 20-day

period. 285 N.W.2d at 669. The court based its decision to enforce strictly the 20-day statutory period on both established precedent and on Minnesota's public policy of encouraging arbitration to promote expeditious dispute resolution.

While the arbitrators' report was submitted to the district court on April 22, 1986, Miller did not request resubmission to the arbitrators until July 11, 1986 (or, at the earliest, at the June 23, 1986 status conference before the district court wherein Miller raised objections to the report). Miller's 42-day delay does not fulfill the 20-day statutory requirement. Therefore, even if Miller could otherwise appeal the arbitrators' decision (and assuming that his appeal could be brought in Arizona rather than Minnesota), his

appellate remedy is precluded because of his own delay in acting.

VII. MILLER'S FRIVOLOUS PETITION FOR A WRIT OF CERTIORARI SUPPORTS AN AWARD OF APPROPRIATE DAMAGES TO RESPONDENTS.

Miller received everything he sought in the district court: (1) an arbitration proceeding in accordance with the Minnesota dissenting shareholder's statute; and, more specifically, (2) judicially declared procedures for conducting the arbitration. Nonetheless, Miller wants more. He desires to ignore his First Amended Complaint, to re-write his pleadings, and to seek declarations on the substance of the arbitrators' ruling (as opposed to the procedural resolutions he requested). In doing so, he criticizes the district court and the court of appeals for not remanding the matter to the arbitration panel to impose a physical asset appraisal method on

their deliberations. Miller engages in his vociferous criticism despite the fact that he never properly challenged the results of the arbitration panel's efforts and he never appealed the district court's declaratory judgment that the arbitrators could use the valuation method they deemed appropriate.

Miller's disdain for the arbitrators' conclusions, as well as the rulings of the district court and the court of appeals, must be viewed in light of Miller's own conduct. The arbitrators requested Miller to appear before them. He refused. Peavey consistently requested Miller to negotiate a price or set a price that he felt his 1,100 shares were worth. He refused. The arbitrators requested the parties to engage in settlement negotiations in an effort to avoid the substantial expense associated

with a detailed appraisal. Miller refused. The arbitrators requested Miller to present material supporting his contention that the net assets of Peavey had a value greater than the purchase price. He refused.

Miller's seven-year effort to obtain more for his shares than any other shareholder received, and more than the experts unanimously agreed that they were worth, has cost Peavey approximately $250,000.00 in appraisal fees, appraisal expenses, legal fees and costs. Miller has forced Peavey to defend against claims not properly asserted and to support the entirely rational conclusions of expert appraisers through the district court, the court of appeals, and finally, this Court. His goal, by any reasonable assessment, was doomed from the start. Nevertheless, Peavey has been subjected

to needlessly protracted proceedings and has suffered damages as a consequence.

Accordingly, Peavey respectfully requests this Court to recognize Miller's Petition for Writ of Certiorari for what it is--frivolous. Pursuant to Rule 49.2, Rules of the Supreme Court of the United States, Peavey, therefore, requests that damages be assessed against Miller in an amount equal to the legal fees and related expenses incurred by Peavey in defending against Miller's Petition in this Court.

VIII. CONCLUSION.

For the foregoing reasons, this Court should deny Miller's Petition for a Writ of Certiorari and award respondents damages against Miller.

RESPECTFULLY SUBMITTED,

William S. Hawgood II
Marcia Horn Yavitz
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003-1897
(602) 229-5200
Counsel for Respondents